

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM Docket No. 97-128
)	
Martin W. Hoffman, Trustee-in-Bankruptcy)	File No. BRCT-881201LG
For Astroline Communications Company)	
Limited Partnership)	
)	
For renewal of license of)	
Station WHCT-TV, Hartford, Connecticut)	
)	
and)	
)	
Shurberg Broadcasting of Hartford)	Federal Communications Commission Office of Secretary
)	File No. BRCT-851202KF
)	
For Construction Permit for a New)	
Television Station to operate on)	
Channel 18, Hartford, Connecticut)	

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Federal Communications Commission

Office of Secretary

To: The Commission

ENFORCEMENT BUREAU'S OPPOSITION TO
PETITION FOR RECONSIDERATION

1. On December 8, 2000, Richard P. Ramirez ("Mr. Ramirez") filed a Petition for Reconsideration. Mr. Ramirez seeks reconsideration of the Commission's *Memorandum Opinion and Order*, FCC 00-387, released November 8, 2000 ("MO&O"). Pursuant to section 1.106(g) of the Commission's rules, 47 C.F.R. § 1.106(g), the Enforcement Bureau ("Bureau") submits the following opposition.

2. Background. The MO&O approved a Joint Request for Approval of Settlement Agreement ("Joint Request") filed by Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership ("Hoffman"), Two If By Sea Broadcasting Corporation ("TIBS"), and Shurberg Broadcasting of

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Hartford (“Shurberg”). The Joint Request offered a means to end a contest for WHCT-TV, Hartford, which began long ago when Shurberg filed an application to obtain a construction permit to operate on channel 18 in Hartford (File No. BPCT-831202KF). During the intervening seventeen years, the parties have litigated a variety of issues before the Commission and the courts, including the Supreme Court. Most recently, the Commission commenced the instant proceeding to determine whether Astroline had misrepresented its status as a minority-controlled entity in order to qualify as a buyer under the Commission’s Minority Distress Sale policy. *See MO&O*, ¶¶ 3-5. The Joint Request followed the *Initial Decision* in this proceeding, which determined that Astroline had not engaged in misrepresentation. *See* FCC 99D-1, released April 16, 1999.

3. The *MO&O* affirmed the *Initial Decision*’s conclusion that Astroline had not misrepresented its status as a minority-controlled entity. Consequently, the *MO&O* further concluded that Hoffman, as Astroline’s successor-in-interest was qualified for renewal of his license. Thus, absent the Joint Request, the stage was now set for a comparative renewal proceeding involving either Hoffman or TIBS against Shurberg.

4. In opposing the Joint Request, Mr. Ramirez had argued that Shurberg lacked standing because his application had never been accepted for filing. In addition, Mr. Ramirez contended that the proposed payment to Shurberg violated section 311(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 311(d), because Shurberg’s only motivation for prosecuting his application subsequent to an unfavorable Supreme Court ruling was to receive a settlement. *See MO&O*, ¶13. The *MO&O* rejected Mr. Ramirez’

arguments. Moreover, the *MO&O* concluded that, notwithstanding the payment limitations imposed by section 73.3523 of the Commission's rules, 47 C.F.R. § 73.3523, approval of the settlement served the public interest by terminating the instant proceeding, avoiding the need for a comparative hearing, and allowing for termination of the Astroline bankruptcy proceeding. *See MO&O*, ¶¶ 14-19.

5. In seeking reconsideration of the *MO&O*, Mr. Ramirez contends that Shurberg should not receive any money in excess of his legitimate and prudent expenses in accordance with section 73.3523 of the Commission's rules, 47 C.F.R. § 73.3523. In this regard, Mr. Ramirez argues that Shurberg did not submit anything that justifies waiver of the rule, and he submits that allowing Shurberg to recover the amount proposed in the Joint Request encourages others to prosecute frivolous applications in the hope of achieving a large settlement. Mr. Ramirez also repeats his arguments that Shurberg's filing and prosecution of its application was abusive. Mr. Ramirez proposes that the fairest way to resolve the instant litigation is to auction channel 18.

6. Discussion. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). Inasmuch as Mr. Ramirez does not attempt to raise new facts, his petition must stand or

fall on whether he can demonstrate the existence of a material error or omission in the *MO&O*. In the Bureau's view, he does neither. Thus, his petition should be denied.

7. Although his logic is less than clear, it is plain that Mr. Ramirez believes that the Commission should not have waived section 73.3523 of the rules. In this regard, Mr. Ramirez observes that neither Shurberg nor any other party provided any evidence as to Shurberg's expenses, and he suggests that the public interest calculus would vary according to the amount of Shurberg's windfall. In other words, the more Shurberg's reward exceeded his expenses the less compelling the public interest justification for waiving the rule.

8. The Bureau disagrees. Indeed, we believe it is immaterial whether Shurberg's ultimate gain is measured in pennies or in millions of dollars. As the *MO&O* explained at note 6 and ¶ 20, waiver of section 73.3523 of the rules in this case is justified in large part because the underlying circumstances that led to the rule no longer exist. Specifically, section 309(k) of the Communications Act, 47 U.S.C. § 309(k), no longer allows the filing of a broadcast comparative renewal application. As a result, the Commission has approved settlements and consistently waived section 73.3523 of the rules without regard to the amount to be recovered by the dismissing challengers so long as the settlement itself demonstrably served the public interest. *E.g., Trinity Broadcasting of Florida, Inc.*, 14 FCC Rcd 20518 (1999). Given the public interest benefits that result from the termination of this litigation and the avoidance of a comparative renewal proceeding, the *MO&O* properly waived section 73.3523 of the

rules. *See also Amendment of Parts 1, 73 and 74 - Competitive Bidding*, 13 FCC Rcd 15920, 16006 (1998) (“*Amendment*”) (subsequent history omitted).

9. Mr. Ramirez’ next argument is that the *MO&O* erred by concluding that Shurberg did not file his application for an abusive purpose. In this regard, however, Mr. Ramirez adduces no new facts. Rather, he merely reiterates arguments that the *MO&O* expressly considered and rejected. *See MO&O* at ¶ 19. Thus, inasmuch as this portion of his petition is nothing more than mere re-argument,¹ reconsideration is not warranted. In this regard, when a petitioner for reconsideration simply reiterates arguments previously considered and rejected, denial is warranted. *See WQAM License Limited Partnership*, 15 FCC Rcd 13549 (2000) (“*WQAM*”).

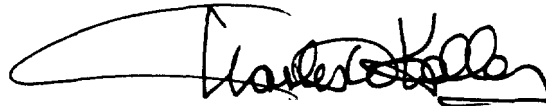
10. Mr. Ramirez’ final argument – that the solution is to auction channel 18 – is easily addressed. In *Amendment*, 13 FCC Rcd at 15921, 15923, the Commission noted that its auction authority did not extend to comparative renewal situations. *See also Implementation of Section 309(j) – Competitive Bidding*, 12 FCC Rcd 22363, 22405-06 (1997). Ultimately, the Commission decided that it had to use comparative hearings to resolve the “handful” of pending comparative renewal cases. *Amendment*, 13 FCC Rcd at 16005. With the grant of Hoffman’s application, a comparative renewal proceeding loomed absent a settlement or dismissal of either Hoffman’s or Shurberg’s application.

¹ Mr. Ramirez’ reliance on *Chameleon Radio Corporation*, FCC 00-397, released December 1, 2000, is misplaced. In *Chameleon*, the Commission barred a licensee, previously found to be a liar, from participating in a “settlement.” Shurberg’s qualifications have never been adjudicated, much less adjudicated adversely.

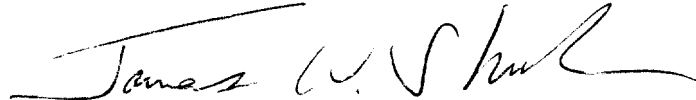
Because no reason currently exists to dismiss either application, settlement is the appropriate vehicle to resolve this situation.

11. Conclusion. Mr. Ramirez' petition for reconsideration contains nothing that calls into question the *MO&O*'s decision to grant the Joint Request and terminate this proceeding. Accordingly, the Commission should deny the petition for reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles W. Kelley", with a large, sweeping initial "C".

Charles W. Kelley
Chief, Investigations and Hearings Division
Enforcement Bureau

A handwritten signature in black ink, appearing to read "James W. Shook", with a large, sweeping initial "J".

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December 21, 2000

CERTIFICATE OF SERVICE

Karen Richardson of the Enforcement Bureau's Investigations and
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